

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

**First Appeal No. 818 of 2001
(Old F.A. No. 422 of 1977)**

State of U.P.

....Appellant.

Vs.

Bhagwan Singh Chauhan, son of Milam Singh Chauhan, resident of village Mikore, Patti District Tehri Garhwal.
(Claimant)

... Respondent.

**Sri Nand Prasad, learned Standing Counsel for the appellant.
None for the respondent despite sufficient service.**

Date November 09, 2006

P.C.: Hon'ble B.S. Verma, J.

This appeal is directed against the judgment and decree dated 18-6-1977 passed by the then District Judge, Tehri in Original Suit No. 70 of 1975, Bhagwan Singh Vs. State of U.P., whereby plaintiff's suit of recovery of Rs. 9,000/- has been decreed along with interest @ 12% per annum, as mentioned in the impugned order.

Relevant facts of the case are that the plaintiff contractor was given contract by Executive Engineer, Provincial Division, PWD, Tehri Garhwal vide bond no. 26/EE dated 9-8-1973 for construction of motor road Ghunti-Chamiyala job No.2. The contract work was completed and the measurements were taken thereby final payment was made. Plaintiff's case was that the liability period for removal of defects had expired before October 1974 and thereafter the plaintiff pressed for refund of security deposit of Rs. 9,000/-, which had been deducted from his bills, but the defendant refused to pay the same. Plaintiff, therefore, filed the suit for recovery of the said amount.

The suit was resisted by the State by filing written statement on the ground that the plaintiff was to start the work on 9-8-1973 and to complete the same by 8-5-1994. The work was completed by 1-5-1974. On the inspection of work on 26.6.1974 defects were found by the Executive Engineer and the plaintiff was informed by registered letters to complete the work within the liability period, but nothing was done, as a result the earnest money and the security deposit of the plaintiff were forfeited. According to the defendant, defects worth Rs. 45,800/- were found and the amount of Rs. 9,100/- had been adjusted towards the removal of the defects.

The following issues were framed in the suit:-

1. Whether the Executive Engineer inspected the work of the plaintiff and found it to be defective as asserted in para 13 of the written statement. Was the plaintiff given notices to remove the defects. What is the effect of the plaintiff not having removed the defects.
2. What was the value of the defective work.
3. Relief to which the plaintiff is entitled.

The learned District Judge recorded the evidence led by the parties, heard them and after perusing the evidence on record, took up Issue No.1 for decision and ultimately came to the conclusion that the defendant could not forfeit the security. It could only be done when there was violation of clause 3(2)(i) of the general conditions of the contract which was not the case so far as the present litigation is concerned. The learned District Judge also observed that "it was not established that the executive engineer inspected the work of the plaintiff and found it defective as asserted by the defendant." The District Judge ultimately decreed the suit of the plaintiff along with interest vide judgment and decree dated 18-6-1977.

In this appeal, the Impugned judgment and decree has been assailed on the ground that the finding of the learned District Judge is not based on a proper appraisal of law inasmuch as the burden of proof lay upon the plaintiff-respondent and not on the defendant-appellant.

I have heard learned Standing Counsel for the State and perused the evidence on record.

The learned District Judge framed important Issue No.1 to the effect “Whether the Executive Engineer inspected the work of the plaintiff and found it to be defective as asserted in para 13 of the written statement. Was the plaintiff given notices to remove the defects. What is the effect of the plaintiff not having removed the defects.” The finding of the court below has to be scrutinized on this issue in this appeal.

It is not disputed that the contract in question was given to the plaintiff. It is also not disputed that final payments were made to the plaintiff for the work undertaken. It is admitted case of the parties that the work was completed by 1-5-1974. It is also not disputed that the liability period was for one year from the date of completion. A perusal of the finding of the District Judge on Issue No.1 shows that the learned District Judge has elaborately discussed the agreement bond and has observed the “The appendix referred in clause 15 shows that the defects liability period was not specified. Since it was not specified this would be one year from the date of completion of the work. The date of the completion of the work admittedly was 1st May 1974 and as such within one year of that date the defects liability period existed and any defects found could be ordered to be remedied and on failure the executive engineer could get the same remedied and recover the cost thereof from any money due to the contractor.” IN the instant case, the alleged date of inspection of the Executive Engineer was 26-6-1974. The record shows that two notices were allegedly given to

the contractor, which are dated 19-7-1974 and 8-8-1974. Ext.A-5 is the notice given to the contractor that the work had been inspected on 26.6.1974 by the Executive Engineer and the defects were required to be removed by the plaintiff. It was mentioned that in case defects were not cured, the security amount shall not be returned. It is not disputed that even after receipt of notice defects were not cured by the plaintiff. According to the plaintiff, the liability period of one year had exhausted.

The crux of the case is whether any defects existed in the work executed by the plaintiff-respondent. The defects were found after the final payment had been made and the Executive Engineer inspected the work. In this case, the Executive Engineer has not come in the witness box. The testimony of Sri Naresh Chand Misra, Junior Engineer, produced by the defendant-appellant itself was of no avail to the defendant. He has stated that the defects in the work of the contract were found when measurements were done in December 1975. This statement made by him rather contradicts the notice that was given on 19-7-1974 indicating the defects were discovered by the Executive Engineer. In the absence of the Executive Engineer concerned in the witness box the evidence of the Junior Engineer examined on behalf of the defendant gives support to the case of the plaintiff that the defects were in fact not found in the work done by the plaintiff and the learned District Judge has rightly held that “the defendant could not forfeit the security. It could only be done when there was violation of clause 3(2)(i) of the general conditions of the contract, which was not the case so far as the present litigation is concerned.” The general condition of the contract have been dealt with by the trial court. It was rightly held by the trial Judge that “since the money of the plaintiff was withheld by the defendant, to my mind, the plaintiff would only be entitled to interest by way of damages after the expiry of the period of notice.” The notice under Section 80 CPC was served on 18-1-1975, therefore, the plaintiff became entitled to interest from 19-3-1975 as has been rightly held by the

learned trial court. Therefore, the interest @ 12% per annum has been awarded from 19-3-1975 till the date of the suit. I have gone through the impugned judgment passed by the District Judge. Every aspect of the case and evidence led by both the parties were considered vis-à-vis the issues framed in the suit. It is not necessary reiterate the entire evidence here again. The finding of the District Judge on Issue No.1 is well reasoned and fully based on proper appraisal of evidence on record.

In this appeal, the appellant could not substantiate its contention that the findings of the trial court are perverse in any manner.

In view of the discussion above and having, I find that the judgment and decree under appeal does not suffer from any illegality or infirmity. The appeal therefore is devoid of merit and is liable to be dismissed.

The appeal is dismissed. The judgment and decree under appeal are upheld. No order as to costs.

(B.S. Verma,J.)

RCP